No. 1036.

Supreme Court of the United States

OCTOBER TERM, 1944.

THE STATE OF OHIO, EX REL. HUGH M. FOSTER,
Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF OF RESPONDENT.

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Cases and Authorities Cited.

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OPINIONS AND DECISIONS OF LOWER COURTS.

This matter was originally presented to the Supreme Court of Ohio in an action seeking a writ of mandamus and was decided against the relator on a demurrer to the first amended petition on February 21, 1940, in the case of **State, ex rel. Foster, v. Miller**, 136 O. S., 295, 25 N. E.

(2d), 686. A second amended petition was stricken from the files. A third amended petition was submitted to the court for leave to file the same and, on consideration, such leave was denied on December 31, 1940, as shown in **State, ex rel. Foster, v. Miller**, 137 O. S., 503, 30 N. E. (2d), 992. An application for rehearing was denied without opinion on January 22, 1941. Two days prior thereto, to wit, on January 20, 1941, the relator commenced a second action in the Court of Appeals, Second Appellate District of Ohio, also seeking a writ of mandamus to compel a similar assessment as sought in the first action, but for the year 1935 only. On September 8, 1943, the Court of Appeals journalized its unreported decision rendered on August 2, 1943, allowing the writ in part. On appeal to the Supreme Court of Ohio, the decision of the Court of Appeals was reversed and the cause dismissed on August 9, 1944, in the case of **State, ex rel. Foster, v. Evatt**, 144 O. S., 65, 56 N. E. (2d), 265. (Appendix A). An application for rehearing and a motion to vacate this judgment were thereafter filed, each suggesting that one of the judges who participated in the decision was disqualified because of a personal interest in the outcome and the relator thereby deprived of due process in violation of the Fourteenth Amendment. The application was denied without opinion on November 22, 1944. On December 20, 1944, the motion to vacate was overruled without opinion, Hart and Turner, judges, not participating.

STATEMENT OF THE CASE.

The case at bar is a sequel to an action, filed early in the year 1939 in the Supreme Court of Ohio, in which the relator in the instant case was also the relator and the Tax Commission of Ohio, the predecessor to the respondent in the instant case, was the principal defendant, which action sought a similar writ in mandamus with respect to sales tax collections during the calendar years 1935 and 1936. Two days before the Supreme Court held that the petition and amended petitions filed therein, which were similar to the petition in the instant case, did not state a cause of action, the present action was filed in the Court of Appeals of the Second Appellate District of Ohio seeking a writ in mandamus to compel the tax commissioner to make an assessment of sales tax against vendors of tangible personal property at retail in the state of Ohio for the year 1935 in an amount equal to three per cent of the gross receipts of such vendors from sales of tangible personal property not specifically exempted from the tax by the provisions of the Ohio Sales Tax Law of 1935 (Section 5546-1, et seq., Ohio General Code), less the amount of sales tax evidenced by the cancellation of prepaid sales tax receipts, as provided by Section 5546-3 of the Ohio General Code, during the year 1935.

In the earlier action instituted in the Ohio Supreme Court by the relator, Judge Zimmerman, at the time of one of the hearings, announced that he and his family were lessors under a lease to the Great Atlantic & Pacific Tea Company, which was one of the parties defendant in such action. All parties waived any objection and re-

quested his participation in the consideration of the case. Judge Turner, whose right to participate in the decision in the instant case has been challenged, was not a member of the court at the time of the hearing of the earlier case, which is reported, as to the decision on the demurrer, in **State, ex rel. Foster, v. Miller**, 136 O. S., 295. However, after Judge Turner became a member of the court, upon the hearing of a motion to a subsequent amended petition, on November 14, 1940, he disclosed to the parties his relationship which is now complained of, as lessor to the Kroger Grocery & Baking Company, also a defendant in such action. (See affidavit of Judge Turner, R., Vol. III, 931.)

On the call of the instant case by the Ohio Supreme Court, Judge Turner announced that he had purchased a property in which the Kroger Grocery & Baking Company was a tenant under a lease which provided for a rent under the flat fee rental basis plus a percentage of the annual gross retail sales in excess of the stated amount. The relator was present in the court room with Mr. I. B. Hart, one of his counsel, and with counsel for the tax commissioner. When the chief justice inquired as to whether there was any objection to Judge Turner's participation, counsel for the relator and counsel for the defendant each expressly waived any objection which they might claim with respect to Judge Turner's participating in the consideration of the case. Later, during the opening statement of the appellant, the other counsel for the relator, Mr. Bigger, came into the court room, but at no time during the argument, in which he participated, or at any time thereafter, prior to the pub-

lishing of the opinion of the Supreme Court, was any objection or complaint made to Judge Turner's or any other judge's participating in the consideration of the case. After the announcements of the decision of the court, the relator filed a motion to vacate the judgment of the court and later filed an application for rehearing. On October 4, 1944, the motion to vacate the judgment was stricken from the files and leave was granted to file a substitute motion if desired. Such substitute motion to vacate the judgment and the application for rehearing were respectively overruled and denied on November 22, 1944. On December 13, 1944, a motion by appellee for an order setting aside the entry of November 22, 1944, overruling the motion to vacate judgment was sustained and thereafter oral argument was heard on said motion to vacate the judgment, and on December 20, 1944, it was overruled by the court, Judges Hart and Turner not participating. Thereafter, on the twelfth day of March, 1945, a petition for a writ of certiorari was filed in this court.

SUMMARY OF ARGUMENT.

I. The relator is estopped from claiming any disqualification of Judge Turner, for the reason that at the outset of the hearing in the Supreme Court of Ohio Judge Turner stated the nature of his interest as a lessor to the Kroger Grocery & Baking Company and upon inquiry of the chief justice, counsel for the relator stated that the relator had no objection to Judge Turner's sitting and requested that he participate in the decision.

II. The decision could not have resulted in any pecuniary loss to Judge Turner for the reason that the lease provided for a flat rental, plus a percentage of annual gross sales, without any deduction for taxes of any kind. After the expiration of the lease Judge Turner called for an accounting from the Kroger Grocery & Baking Company, which was had and to which he agreed, thereby making a full and complete settlement with the grocery company (R., Vol. III, 931). Even though such settlement had not been made, the gross sales would have remained the same and his rental therefor the same. A deficiency sales tax assessment against the Kroger Company might have decreased the net profits, but Judge Turner's rental, being based on a percentage of gross sales, would not have been affected by a reduction in net profits.

III. Where the state constitution and laws make no provision for a substitute judge, a judge should not refuse to participate if his participation is essential to a decision, merely because a litigant objects or because he prefers not to sit. Such preferences will not excuse him

from performing his official duties which sovereignty has assigned to him.

IV. There is no error in the decisions of the Supreme Court of Ohio, for during the year 1935 the law neither imposed the duty on the Ohio taxing authorities nor did it grant the power to make the assessment in the amount or in the manner sought by the relator.

ARGUMENT.

I.

The Parties in the Case Below Waived Any Claim of Disqualification of Judge Turner at the Time of Hearing.

In **Tari v. State**, 117 O. S., 481, it is held that if a trial judge had such an interest in a case as would otherwise disqualify him from hearing and determining the case, such disqualification is waived unless objection is made thereto at the earliest available opportunity (see second paragraph of syllabus). The opinion in such case was written by the then Chief Justice Marshall who reasoned, at page 491, as follows:

> "While it is well settled that jurisdiction over the subject matter cannot be conferred by consent, it is equally well settled that a submission on the part of a defendant without objection to being tried completes the jurisdiction over the person, and it is conclusively settled that such submission, followed by an actual trial and judgment, renders the judgment a finality, not subject to collateral attack, and not subject to direct attack in an error proceeding, unless the question was raised and the objection made in the trial court at or preceding the trial."

On page 496, he stated:

> "From the foregoing authorities and by the overwhelming weight of all authority, it is clear that the sound rule is that matters of interest or bias, or prejudice of the judge, except where it amounts to actual fraud, are to be regarded as private matters, concerning only the parties to an action, and not affecting public policy. Such matters affect only the qualification of the judge, and, if they affect the jurisdiction at all, they must relate only to the jurisdiction over the person, and not to the jurisdiction over the subject matter of the action.
>
> By a like overwhelming authority, they are matters of privilege, and, whether they are guaranteed by a constitutional or statutory provision, or by some principle of the common law, the privilege is regarded as waived, unless claimed at the earliest available opportunty."

And on page 497 as follows:

> "If the disqualification of a judge by reason of interest should be held in every instance to destroy the jurisdiction of the court, and to render the judgment null and void, the finality of judgments would be seriously jeopardized. The party whose interests are adversely affected would in every instance decline to raise the objection and seek to prevail on the merits of the case, and, if unsuccessful, enjoin the execution of the judgment in a collateral proceeding. A judgment which is absolutely null and void for want of jurisdiction of the court to render it is not binding upon either party. Estoppel would not apply. A plaintiff after defeat could immediately institute another action, and former adjudication could not be pleaded."

Not only does the rule announced in **Tari v. State**, supra, appear to be the law in Ohio, but it appears to be the rule in other jurisdictions. In 30 Am. Jur., 800,

"Judges," Section 95, the learned author states the rule as follows:

> "* * * where the disqualification is known to the complaining party at or before the trial, it is generally deemed to be waived, or that an estoppel arises, where no objection is made in the trial court, or by appearing before the judge and proceeding with or contesting the case, or permitting it to proceed to judgment without objection, or where the objection is first made subsequently to the making of rulings in the case involving the exercise of judicial discretion, or on a motion for a new trial."

See also 23 O. Jur., 458, "Judges," Section 107, and notes in 5 A. L. R., 1588, and 57 A. L. R., 292; **Klose v. United States**, 49 Fed. (2d), 177.

It should be remembered that after Judge Turner had made a complete disclosure of the facts complained of, the chief justice inquired specifically as to whether there was any objection to the participation by Judge Turner in the consideration of the instant case, and that not only did no party raise an objection but counsel for both parties announced in open court that they had no objection to such participation and requested the same.

If we were to assume that the matters complained of amounted to an interest in the case on the part of Judge Turner, then since, prior to the institution of the case at bar in the Court of Appeals, all the facts with respect to the interest of Judge Turner were known by all of the parties to the case and their counsel (with the exception of Mr. I. B. Hart, who expressly waived his objection at the time of the hearing after a second disclosure by Judge Turner), it would seem that it was the duty of such parties to have made such objection at the com-

mencement of the hearing by the Supreme Court. When the application for rehearing filed by the relator in the Supreme Court of Ohio and the brief in support thereof are read, we must conclude that it was only after the decision was rendered, but not before, that the relator came to the conclusion that he objected to participation by Judge Turner and that he would have preferred some other judge to have written the opinion. At no time prior to reading the decision did the relator express any concern over who should participate in the case. Since the objection was not made prior to the submission of the case and not until after the announcement of the decision, the relator thereby waived any objection to which he might have otherwise been entitled and must be deemed to have consented to the participation of Judge Turner in the decision.

II.

The Facts Alleged Do Not Show Any Interest of Judge Turner Which Would Disqualify Him From Participation in the Consideration of the Case.

To disqualify a judge from participating in the consideration and decision of a cause on the ground of interest, it is necessary that the result of the decision must directly affect him to his pecuniary loss or gain or so affect his property. **Love v. Wilcox**, 119 Tex., 256; **Sioux City v. Western Asphalt Paving Corp.**, 223 Iowa, 279; **Metsker v. Whitsell**, 181 Ind., 126; **State, ex rel. Seiders v. Bangor**, 98 Me., 114; **Foreman v. Marianna**, 43 Ark., 324; **Ex Parte Harris**, 26 Fla., 77.

It is not contended that Judge Turner was a stockholder in any vendor subject to the Ohio Sales Tax Law. It is not contended that any such vendor was indebted to him. Such were not the facts. The alleged interest of Judge Turner is limited to that disclosed by him in his statement before and at the time of the hearing. Before the hearing and again at the time of the hearing, Judge Turner disclosed that during the month of June, 1935, he had purchased a building in which the Kroger Grocery & Baking Company was among the tenants. The grocery company's occupancy was under a lease which reserved a guaranteed annual flat rental, plus a percentage rental based on gross sales without any deduction for taxes of any kind, less however the cost of certain improvements. After the expiration of such lease and before the argument of this case on the merits, Judge Turner called upon the Kroger Company for an accounting. This showed

that the cost of repairs exceeded by $906.48 the rentals due Judge Turner under the percentage provision, which amount by the terms of the lease was cancelled. This accounting was accepted by Judge Turner and the liability between him and the Kroger Company for the year in question was fully settled. (R., Vol. III, 920.)

Even if there had not been a settlement between Judge Turner and the Kroger Company, his relationship under the terms of the lease could not be such as to constitute an interest in the outcome of this litigation. A decision resulting in a deficiency sales tax assessment against the Kroger Grocery & Baking Company for the year 1935, could not have affected Judge Turner's interest under the lease because the amount of gross sales would have remained the same, and his rental therefor would have remained the same. A deficiency assessment against the Kroger Company would probably have decreased the net profit of the Kroger Company from the operation of that particular store, but Judge Turner's rental would not have been affected in any manner by a reduction in such net profits.

III.

Judge Turner Had a Duty to Participate in the Decision of the Instant Case.

In our argument as hereinabove set forth, we have discussed the proposition of eligibility of a jurist to consider a case as though the judge in question was a trial judge, rather than a reviewing judge. It should be borne in mind that the Legislature has set up certain grounds which disqualify a trial judge from hearing a case for the possible reason that, in the opinion of the General Assembly, another trial judge may be assigned in his place. Such condition did not exist in Ohio with respect to judges of the Supreme Court.

As was stated by Otis, J., in **United States v. Pendergast**, 34 Fed. Supp., 269:

> "No judge should step aside from any case merely because a litigant prefers some other judge. The judge is not a referee selected by the parties. He is more than a referee and he is selected by the sovereign power of the nation. It is morally wrong for him to abandon the post the sovereign has assigned him except only when it is required by law."

Also, in the case of **State, ex rel. Mitchell, Atty. Gen., v. Sage Stores Co., et al.**, 157 Kan., 622, 143 Pac. (2d), 652, the court held as stated in the third and fourth paragraphs of the headnotes, as such case is reported in the Pacific Reporter:

> "Where Supreme Court justice, although not legally disqualified, prefers not to participate in a decision to avoid any possibility of suspicion of bias or prejudice, the preference may be recognized so

long as it does not result in denying to a litigant his constitutional right to have the presented question adjudicated, but when preference comes in conflict with official duty, the preference must yield.

Actual disqualification of member of court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated."

In the instant case, Judge Hart had declined to sit in the case since his son, Mr. I. B. Hart, was one of counsel for the appellee. If Judge Turner was ineligible to participate, by like reason Judge Zimmerman would have been ineligible to sit (which we do not now and never did believe to be either the fact or law), and there would have been a bare majority of the court which would have been eligible to participate. It could well be probable that some of the other members of the court were lessors of real property to lessees who were vendors of personal property at retail, which lessees necessarily would have been affected by the decision of the case below if they were in business during the year 1935.

If the argument of the relator is followed to its logical conclusion, no judge would be qualified to sit as a reviewing judge in any case in which any person or corporation might be affected if he were a lessor or had any contractual relationship with such person or corporation even though the outcome of the decision would not in any manner affect the jurist in the respect of any right under such lease or contract.

IV.

There Is No Error in the Decision of the Court Below.

The action for which the writ of certiorari is asked is one in mandamus, which arose as an original action in the Court of Appeals for the Second Appellate District of Ohio. An action for a writ in mandamus in Ohio is a statutory action. Sections 12283 to 12302, both inclusive, Ohio General Code. The writ will issue only to command an inferior tribunal, a corporation, a board or person to perform some duty which the law specially enjoins upon them as a result of or as an incident of their office, trust or station. Section 12283, Ohio General Code; **State, ex rel. White v. Cleveland,** 132 O. S., 111. It will not issue to control discretion placed in the officer by law. Section 12285, Ohio General Code: **State, ex rel. Methodist Children's Ass'n. v. Board of Education,** 105 O. S., 438; **Ex parte Black,** 1 O. S., 30; **State, ex rel. Ross, v. Board of Education,** 42 O. S., 374, 378. It does not lie where the performance of the act for which it is sought is not one which is specially enjoined by law to be performed by the defendant as a result of his office, trust or station. Section 12283, Ohio General Code; **Selby v. State,** 63 O. S., 541; **State, ex rel. Miller, v. Industrial Commission,** 128 O. S., 254; **State, ex rel. Brophy, v. Crawford,** 127 O. S., 580; **State, ex rel. Stranahan, Harris & Co., v. Backus,** 125 O. S., 115.

While under certain circumstances a writ of mandamus will issue to compel an administrative officer to use his discretion when a duty so to do is imposed upon him by statute, it will not be issued to compel him to use it in

any particular manner (Section 12285, Ohio General Code; **State, ex rel. White, etc., v. Jewell,** 132 O. S., 300; **State, ex rel. Frye, v. MacConkey,** 136 O. S., 462), such as sought in the case at bar or to correct errors in his use of the discretion imposed upon him by statute. **State, ex rel. Miller, v. Industrial Commission,** 128 O. S., 254, 256; **State, ex rel., v. Crites,** 48 O. S., 142. Nor can the court in issuing the writ substitute its discretion for that of the officer. **State, ex rel. Christman, etc., v. Skinner,** 127 O. S., 55.

Under the guise of a writ in mandamus it is not permissible for the court to create a duty and thereupon issue a writ in mandamus to enforce its performance; the duty for which the writ is issued must have existed by virtue of some statutory enactment. **Davis, Mayor, v. State, ex rel. Pecsok,** 130 O. S., 411; **State, ex rel. White, v. City of Cleveland,** 42 O. App., 72.

In the case at bar, a writ in mandamus is sought to compel the tax commissioner to make an assessment of sales tax against vendors of tangible personal property at retail in Ohio for the year 1935 in an amount equal to three per cent of the gross receipts of such vendors from sales of those classes of tangible personal property not specifically exempted from tax by the provisions of the Ohio Sales Tax Law of 1935 (Section 5546-1, et seq., Ohio General Code), less the amount of sales tax represented by the cancellation of prepaid sales tax receipts as provided by Section 5546-3, Ohio General Code, during such year 1935.

The Ohio Supreme Court held, in denying the writ in mandamus, that with respect to the sales of tangible personal property at retail during the year 1935 the law

neither imposed a duty upon the tax commission or tax commissioner nor did it grant them the power to assess a tax of the amount or in the manner sought by the relator and that for such reason the writ could not issue. See **State, ex rel. Foster, v. Evatt, Tax Commissioner,** 144 O. S., 65. In its opinion (page 103), the court directed attention to the fact that presently existing Section 5546-12a, Ohio General Code, if it had been in effect during the year 1935, would have authorized and required the tax commission to have performed the action for which the writ is sought; it further directed attention to the fact that such Section 5546-12a, Ohio General Code, was not in effect during the year 1935 and, in fact, was not enacted by the General Assembly until December 22, 1936 (116 O. L., pt. 2, 333). See page 103 of court's opinion. The Supreme Court of Ohio had, prior to the institution of the instant case, laid down the rule which it reiterated in the opinion complained of. See **State, ex rel. Foster, v. Miller,** 136 O. S., 295.

In the case of **State, ex rel. Foster, v. Miller,** 136 O. S., 295, the court had held (at a time when Judge Turner was not a member of the court) that during the year 1935 the Ohio Sales Tax Law levied only a tax on each individual sale of tangible personal property at the rates and as specified in Section 5546-2, Ohio General Code, and that, in the absence of evidence of specific sales with respect to which no tax was paid, the tax commissioner had no authority to make a deficiency assessment and that a writ of mandamus could not be issued to compel him to make the assessment which he had no authority by law to make. Such was the holding of the Supreme Court of Ohio in **State, ex rel. Foster, v. Miller,** 136 O. S.,

295, when Judge Turner was not a member of the court, and such was the holding of the court in **State, ex rel. Foster, v. Evatt,** 144 O. S., 65.

An examination of the Ohio Sales Tax Law as it existed during the year 1935 will disclose that no levy of tax was made by such law other than that levied by Section 5546-2, Ohio General Code, which levied a tax with respect to sales transactions in excess of nine cents at the following rates: On sales transactions at prices between nine cents and forty cents, one cent; on sales transactions at prices from forty-one cents to seventy cents, two cents; and on sales transactions at prices from seventy-one cents to one dollar and eight cents, three cents; and similarly on sales transactions in excess of one dollar and eight cents.

Section 5546-3, Ohio General Code, required the vendor to prepay the tax by purchasing from the treasurer of state prepaid sales tax receipts which he was to cancel in the presence of the purchaser and deliver one-half thereof to the purchaser upon being reimbursed for his advancement at the rates specified in Section 5546-2, Ohio General Code. Section 5546-12, Ohio General Code, authorized the tax commissioner to require the vendor to preserve his sales records for a period of three years and if upon the commissioner's audit it was determined that the vendor did not cancel sufficient stamps with respect to the sales transactions made by him, to collect such deficiency from the vendor with a penalty of fifteen per cent. In the case at bar, no evidence of any specific sales transaction was produced; no evidence was produced of any sales transaction in which the vendor failed to cancel prepaid sales tax receipts in the amount and as

required by Sections 5546-3, Ohio General Code. No evidence was presented of any transaction in which any vendor had collected a tax for which it did not account. And no knowledge of any such practice was known to the commissioner. Evidence was introduced which had a tendency to indicate that the tax commission attempted to make a deficiency assessment against certain vendors for the year 1935, using as a basis therefor a weighted average rate which the commission thought should equal the amount of revenue which the commission believed should have been produced by the sales tax law. When such attempt was made, certain taxpayers questioned the legality thereof; whereupon, the tax commission requested an opinion of the attorney general, who ruled the procedure unauthorized. The commission thereupon, in the exercise of its discretion and upon the advice of the attorney general, determined that no deficiency of tax was due from vendors with respect to the year 1935 unless it found evidence of specific or individual sales transactions in which proper face amounts of prepaid sales tax receipts had not been canceled. Such was the correct interpretation of the Ohio Sales Tax Law of 1935 as was determined by the Supreme Court of Ohio in 1939 in the case of **State, ex rel. Foster, v. Miller,** 136 O. S., 295, decided before the instant case was instituted and again in the instant case. The tax commissioner had used his discretion. Can he be compelled in mandamus to use it in another manner without evidence of an abuse of discretion as in the case at bar?

CONCLUSION.

Under the Constitution and laws of the State of Ohio, there could have been no substitute judge assigned to the case. It was the duty of each judge to cast aside any inconsequential personal considerations and participate in the decision. The decision itself was a correct decision under the facts and laws of Ohio. Although the court below gave the case full consideration, actually the matter at issue was res adjudicata, for the same issues between the same parties had been decided in the previous case.

The only federal question, if any, presented is whether or not the relator was deprived of any rights under the Fourteenth Amendment to the Federal Constitution because of Judge Turner's participation in the decision on the merits in this case by the Supreme Court of Ohio. From the foregoing, it must be concluded that he was not.

The question of whether or not Judge Turner had any interest in the case, even though all of the facts were known to all parties and counsel when the case was argued upon its merits, was not raised until after the decision on the merits. Thereafter, the question was raised on motion to vacate the judgment, supported by affidavits, and in an application for rehearing. Judge Hart did not participate in the judgment on the merits, and Judges Zimmerman and Williams dissented. The record shows that the application for rehearing was denied by the court. Judge Turner's participation in the ruling on this application was therefore of no moment.

The record on the motion to vacate the judgment shows that Judge Turner had absolutely no pecuniary interest in the matter before the court on the merits because: (1) he previously had made a complete settlement with his lessee; and (2) had he not so settled, the decision of the court on the merits could not in any manner have affected the amount of rentals he was entitled to receive under the terms of the lease. All of the judges of the Supreme Court, except Judges Turner and Hart who did not participate, and including Judges Zimmerman and Williams who dissented to the judgment on the merits, must have so decided when they joined in overruling the motion to vacate the judgment. (R., Vol. III, 910.)

Every consideration that may be given to the relator's petition leads to the conclusion that his claim is frivolous. No federal question is truly raised. His petition should be denied.

Respectfully submitted,

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